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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

—against—

THE REPUBLICA OF CUBA and DANIEL SOLANO PINERA, As Intervenor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

VICTOR RABINOWITZ
Attorney for Respondents
30 East 42nd Street
New York, New York 10017

DUNCAN BOWMAN,
Of Counsel

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

1. Was the petition for certiorari improvidently granted in that

(a) under the applicable Cuban Assets Control Regulations (31 C.F.R. § 515 et seq.) there are no assets on which an affirmative judgment for petitioner could be executed;

(b) the questions posed by this Court in granting the petition cannot be briefed on the record in this case because they make assumptions which have no foundation, and

(c) the petition herein raises but a few of a number of closely interlocking issues in a complex litigation and an adequate review of the issues herein is not possible in isolation from the questions raised in other petitions for certiorari pending in this Court. See *Republic of Cuba, et al.* v. *Menendez, et al.*, No. 73-1287, and *Saks and Company, et al.* v. *Republic of Cuba*, No. 73-1289.

If the writ be not dismissed, the proper questions for presentation on the merits are as follows:

2. Does the course of conduct engaged in by respondents in accepting, in Cuba, the payments made by petitioner and in refusing to repay, under a claim of entitlement based upon a valid nationalization decree, constitute an act of state within the doctrine of *Banco Nacional* v. *Sabbatino*, 376 U.S. 398?

3. If so, should there be an exception to the act of state doctrine which would permit petitioner to obtain any judgment on a counterclaim? If such exception is to be made, should it be further extended to allow an affirmative judgment where judgment on said counterclaim does not exceed the total net balance owed to Cuba on its claims against other defendants in other actions when said claims arose out of transactions similar to those on which petitioner's counterclaim is based and when the cases of petitioner and said other defendants were consolidated for purposes of trial only?

Counter Statement of Facts

By decree dated September 15, 1960 four Cuban-owned cigar manufacturers which had been selling cigars to petitioner were nationalized (or "intervened") and their assets

were taken over by the government-appointed interventor, respondent Daniel Solano Pinera. For about four months thereafter petitioner continued to purchase cigars from the interventor, most of which were not paid for. Early in 1961 the four dispossed Cuban owners of the cigar factories sued petitioner, in four separate actions, for cigars which, they claimed, had been delivered to petitioner but not paid for, and for trademark infringement.

Before any further proceedings could be taken in those cases, the interventor sued the former owners for a determination of the respective rights of the parties to the purchase price of the cigars and the use of the trademarks. In that action, entitled *Palicio* v. *Brush and Bloch*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F. 2d 1011 (2nd Cir. 1967), *cert. den.*, 389 U.S. 830 (1967), the court held that the nationalization decree did not raise any question of international law, and that the interventor was entitled to the purchase price of the post-intervention shipments of cigars, but that he did not own and could claim no rights under the trademarks. Pending the decision in the *Palicio* case, the original four actions by the former owners against petitioner were held in abeyance.

Following the decision in *Palicio*, the district court consolidated the four actions against petitioner, and permitted the respondents to intervene therein to press their claims against petitioner for the post-intervention shipments.[1]

Up to this point (May 16, 1967) and for several months thereafter, neither petitioner nor respondents nor the District Court, were aware that the former owners had a substantial claim against petitioner arising from the pre-intervention sale of cigars and therefore none of the parties

1. There is no dispute as to respondents' right to payment for post-intervention shipments.

anticipated the issue now before this Court. As a result of discovery proceedings and other steps taken in connection with preparation for trial, the following picture, not foreseen in the *Palicio* litigation, developed:

(1) There were substantial pre-intervention shipments of cigars to petitioner for which the former owners had not received payment, and for which they claimed payment from petitioner.

(2) Petitioner claimed to have paid respondent-interventor for such shipments, and argued that the former owners, by their conduct, had forfeited any right to payment.

(3) The respondents claimed that they were entitled to payment for the pre-intervention shipments because the nationalization decree of September 15, 1960 had nationalized all assets of the cigar companies, including accounts receivable.

The district court disposed of these issues by holding that:

(a) the former owners, and not the interventor, were entitled to payment from petitioner for pre-intervention shipments;

(b) the former owners were not estopped from claiming such payment;

(c) the petitioner had paid the respondent-interventor for pre-intervention shipments by mistake;

(d) the respondents were therefore obligated to return to petitioner the money paid by mistake;

(e) since the amount of the pre-intervention payments by petitioner exceeded by $53,000 the amount due to Cuba for post-intervention shipments,

the district court directed an affirmative judgment in favor of petitioner against respondents for that sum.

On appeal, the Court of Appeals considered all of the above issues and several others and sustained the district court as to all of the issues except (e). As to that issue, the Court of Appeals held that an affirmative judgment was not proper. All of the other issues in the case (a, b, c and d above, as well as a number of others) are the subject of two other petitions for writs of certiorari pending before this Court (Nos. 73-1287 and 73-1289). No action has been taken by the Court on those petitions.

Relevant Regulations

Relevant portions of the Cuban Assets Control Regulations, 31 C.F.R. § 515 et seq. are set forth in Appendix A hereto.

Summary of Argument

I. The petition for certiorari was improvidently granted and the writ ought now to be dismissed because:

(1) Under the provisions of the Cuban Assets Control Regulations, 31 C.F.R. § 515, et seq., there are no assets of Cuba against which the petitioner can collect any affirmative judgment it may secure in this case. Hence, although a justiciable question is presented, the case is moot so far as any practical benefit to petitioner is concerned;

(2) The questions put by this Court in its order of May 13, 1974 granting the petition for certiorari are not raised by the record and hence cannot be briefed except as abstract academic inquiries. In addition, the meaning of the second question posed by this Court is unclear, but it seems to be based upon an inaccurate assumption, namely,

that this Court in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (hereinafter "*Citibank*"), adopted some sort of "counterclaim exception" to the act of state doctrine;

(3) The Court, in granting this petition, left undecided two companion petitions which raise questions of law which interlock with those in the instant case. The Court's action results in uncertainty as to what effect a decision on this petition will have on the entire controversy, and raises the possibility of long-continued litigation before final resolution can be had.

II. On the merits, this record properly raises the question of whether the course of conduct followed by respondent Republic of Cuba constitutes an act of state under the doctrine of *Banco Nacional de Cuba* v. *Sabbatino* 376 U.S. 398. Respondent urges that Cuba's receipt of monies paid to it and its refusal to surrender those monies in reliance on its interpretation of the decree of the Cuban government which nationalized Cuban-owned tobacco factories, constitutes a classic act of state, the validity of which cannot be reviewed by the courts of the United States.

III. Contrary to the suggestion which may be contained in the second question put by the Court, there is no exception to the act of state doctrine which will permit petitioner even to maintain its counterclaim, much less to secure an affirmative judgment on it. A majority of this Court in the *Citibank* case, *supra*, expressly disapproved any counterclaim exception to the rule set down in *Sabbatino*. Even those members of the Court who advocated a counterclaim exception expressly disapproved any rule which would permit an affirmative judgment on such a counterclaim. There is nothing in this record to justify an extension of a counterclaim exception (which exception was expressed most clearly in the concurring opinion of Mr. Justice Douglas in the *Citibank* case) to permit an affirmative judgment here. The mere fact that several separate and independent cases were, as a matter of convenience, tried jointly does not permit petitioner to measure its recovery against the aggregate of judgments secured in all the cases to determine whether its judgment is "affirmative".

The granting of a counterclaim exception and the expansion of that exception to include petitioner's claims here will result in the frustration of Congressional and Executive intent in devising a program for the marshalling of Cuban assets.

ARGUMENT

POINT I

The writ of certiorari was improvidently issued and should now be dismissed.

We respectfully suggest to this Court that the petition for a writ of certiorari granted on May 13, 1974 in this matter was improvidently granted, and that the writ should be dismissed for three reasons:

A. The Issue Presented By This Writ Is, In Practical Terms, Moot So Far As Petitioner Is Concerned.

The district court awarded petitioner, on its counterclaim, an affirmative judgment of about $53,000 plus interest over and above the amount of respondents' claim against petitioner. The Court of Appeals, in affirming the district court generally, reversed as to that single item. The question before this Court therefore is whether petitioner shall have judgment in its favor against the respondents in said sum.

Although a theoretical question of law is presented by the record this issue is, in practical terms, moot as to petitioner because for the foreseeable future, and perhaps forever, there is no way in which petitioner can collect on that judgment.

A short review of the background of the handling of claims of United States nationals against other foreign countries is in order. Although there has been no agreement or settlement with Cuba, there is enough history to establish clearly the relevant policy of the United States with respect to this subject.

The techniques adopted by our government to settle foreign claims has historically consisted of three steps, the second and third of which may be taken in reverse order.

(1) The assets of the foreign country and its nationals in the United States have been frozen, subject only to a license issued by the Treasury Department. Executive Order No. 8389 of April 10, 1940, set down as a note to 12 U.S.C. § 95a; 31 C.F.R. § 500 et seq. A similar regulation has been promulgated freezing Cuban funds, 31 C.F.R., § 515 et seq.; see Appendix A to this brief.

(2) Congress has provided machinery for the registration of claims by American citizens against the nationals of the foreign power in question and for the payment of those claims out of the frozen funds, 22 U.S.C. § 1621 et seq. Similar machinery has been set up in the case of Cuba, 22 U.S.C. § 1643 et seq, except that in the case of Cuba there is no agreement for the payment of claims and the statute makes no provision for payment.

(3) A treaty or executive agreement has been entered into between the United States and the foreign power. The

prototype of such an agreement was the Litvinov Agreement with the Soviet Union in 1933; since World War II a series of similar agreements have been entered into between the United States and other countries which have nationalized property owned by United States nationals. See Executive Agreement between United States and Bulgaria, 1963, 14 U.S.T. 969; Executive Agreement between United States and Poland, 1960, 11 U.S.T. 1953; Executive Agreement between United States and Rumania, 1960, 11 U.S.T. 317; Executive Agreement between United States and Yugoslavia, 1948, 62 Stat. 2658, T.I.A.S. 1803; Executive Agreement between the United States and Italy, 1947, 61 Stat. 3962, T.I.A.S. 1757.

This third step, of course, is missing in connection with claims against Cuba.

From the point of view of the United States, this policy can be effectuated only if (1) the collection of claims by nationals of the United States against foreign countries outside the machinery provided by the joint action of the Executive and Legislative Branches is prohibited, and (2) the integrity of the frozen funds is maintained to the greatest extent possible. The first of these conditions has been accomplished in the past by providing, in the relevant executive agreement, that the United States waives any claims any of its citizens may have against the foreign sovereign. Such provisions have been included in each of the treaties mentioned above. This makes it impossible for a creditor to proceed directly against the sovereign and the only way in which he can collect is through the distribution of the frozen funds by the Foreign Claims Settlement Commission.

The second condition has been accomplished by the policy of the Treasury Department in refusing the free

grant of licenses for the release of frozen funds. See *Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106 (2d Cir. 1966), *cert. den.* 385 U.S. 898.

After the petition was granted in this proceeding, we were advised by counsel for the petitioner that he had discussed with the Acting Director of the Office of Foreign Assets Control (the representative of the Department of Treasury charged with enforcing the Regulations) the possibility that any judgment issued in favor of the petitioner could be enforced by execution on any assets of the Cuban Government, and specifically on the claim of Cuba against Faber, Coe & Gregg, one of the other tobacco importers. He was advised, we understand, that such a license would *not* be issued. Subsequently counsel for respondents wrote to the Office of Foreign Assets Control to confirm his understanding that such was the policy of the Office. The inquiry was made on July 1, 1974 and an answer was received dated August 1, 1974. Copies of both letters are annexed hereto in Appendix B.

The petitioner here has never filed a claim with the Foreign Claims Settlement Commission, and it is too late to do so now.[2] Instead petitioner has proceeded quite independently to seek the judgment awarded by the District Court. So whether or not petitioner gets a judgment here, if past practice is to be followed it would not be eligible to participate in the distribution of the frozen funds.[3]

2. The deadline was May 1, 1967.

3. The Foreign Claims Settlement Commission reports that 5,911 claims against Cuba, totalling $1,799,548,568.69, have been filed and approved by the Commission. (Foreign Claims Settlement Commission, Annual Report, 1972, p. 412.) There is no recent census of the value of Cuban assets which have been frozen, though a census was taken by the Office of Foreign Assets Control as of the date of the freeze in 1963. It is difficult to analyze that census and

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This is a busy court and it is concerned with important issues. It ought not to devote its energies to the determination of points of law which, however interesting they may be, are in practical terms, academic. Supreme Court Rules, Rule 19(a); *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74; Address of Chief Justice Vincent before American Bar Association, Sept. 7, 1949, quoted in Stern & Gressman, *Supreme Court Practice*, 4th Ed., p. 150.

B. The Issues Framed by the Court Are Not Issues Raised By the Record and Cannot Be Intelligently Briefed.

The two issues framed by the Court in its order granting the petition for writ of certiorari are:

> "1. Can statements by counsel for the Republic of Cuba, that petitioner's unjust enrichment counterclaim would not be honored, constitute an act of state?
>
> 2. If so, is an exception to the act of state doctrine created, under *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's co-defendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?"

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arrive at a reliable net figure. A total of $148,800,000 of Cuban assets was reported, of which only $19,600,000 was the property of the Cuban Government and its agencies. Even this is a gross, not a net, figure. Much of the balance is in the form of choses in action, which may, or may not, have value. (Treasury Department, Office of Foreign Assets Control, Census of Blocked Cuban Assets in the United States. Undated.)

We most respectfully suggest that neither of these issues can be briefed or argued on this record, as both issues make assumptions which have no foundation.

1. The first question put by the Court would require respondents to defend a legal position they have never advanced at any time in this litigation. Neither the respondents nor the Court of Appeals nor anyone else has ever said that "statements of counsel . . . constitute[d] an act of state" and it is unreasonable to ask respondents to brief that question.

The role of counsel for the Republic of Cuba in this case has been no different from the role of counsel in any other case. Counsel has presented to the Court the legal position of his client. The Republic of Cuba takes the legal position that its conduct in collecting the funds in question from petitioner in Cuba, and in refusing to repay it, on the grounds urged here constituted an act of state (*infra*, p. 16). Counsel did nothing but transmit that view to the district court and to the Court of Appeals. Counsel's role in his case was the same as his role in the *Sabbatino* or *Citibank* cases or any other case before this Court.

The Court of Appeals held that the respondents' conduct constituted an act of state. Respondents shall, in Point II herein, address themselves to that point, although we are not at all sure that this Court issued its writ to review that issue. We canot address ourselves to the point framed by this Court because respondents have never contended that statements of counsel "constituted" an act of state and we respectfully decline to be drawn into a debate over that proposition.

2. The second question put by this Court likewise cannot be briefed:

(1) It assumes an affirmative answer to question 1, which is itself not a proper issue.

(2) It refers to a balance owed to Cuba "by petitioner's co-defendants." Petitioner had no "co-defendants." This case was started in 1961 when four actions were filed, all against petitioner. In 1966, the four actions were consolidated into a single proceeding against petitioner, and respondents were allowed to intervene as parties-plaintiff. There was never more than one defendant in this action.[4]

It is true that this action and two others[5] were tried together in 1969, but no order of consolidation of these three actions was ever entered in the district court. A joint trial was agreed upon for the convenience of the court and counsel, since most of the legal (but not the factual) issues were common to all cases, and the appeal was argued jointly for the same reason. But the defendants in the other cases were in no sense "co-defendants." Each defendant filed separate pleadings; each defendant was represented by its own counsel; each defendant filed its own brief and made its own argument in the district court, and three separate judgments were entered. Only one of the three defendants made this application for a writ of certiorari, although, as is noted above, there is another petition pending (No. 73-1289) in which all defendants have joined.

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4. When the four actions against petitioner were commenced in 1961, a corporate affiliate of petitioner, Dunhill International, Inc. was joined as a party defendant. That affiliate was dropped from the case by stipulation in 1967. We assume that the reference to co-defendants was not intended to refer to Dunhill International.

5. *Menendez et al* v. *Saks & Co.*, 61 Civ. 3336 and *Cifuentes* v. *Faber, Coe & Gregg*, 61 Civ. 472.

(3) The question posed by this Court apparently assumes that some sort of "exception to the act of state doctrine [was] created under *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972)" relating to counterclaims.[6] There was no such exception to the act of state doctrine created by that case or any other. Quite the contrary—this Court refused to create such an exception in the *Citibank* case.

This Court will recall the several opinions in that case. Five justices (BRENNAN, STEWART, MARSHALL, BLACKMUN and POWELL, *JJ*) expressly rejected any counterclaim exception to the act of state doctrine (406 U.S. at 773, 793 *et seq.*) Three justices (BURGER, *CJ* and WHITE and REHNQUIST, *JJ.*) found an exception in the facts of that case, placing primary reliance on a letter written by the Legal Advisor of the State Department. (406 U.S. at 764). No such letter was written here and certainly Mr. Stevenson's letter in the *Citibank* case does not reach the issues in this case. See p. 24 *infra*.

Only one justice, Mr. Justice Douglas, took the position that there was a counterclaim exception to the act of state doctrine. (406 U.S. at 771) With all due respect, we submit that the conclusion reached in his opinion was incorrect.

We will argue in Point III herein that there is, and should be, no counterclaim exception to the act of state doctrine, and that even if there is to be such an exception, it should not be applied here. Here, again, we are not at all sure that this Court issued its writ in order to review that question.

6. The question posed by the Court is somewhat ambiguous, but if the Court is not making such an assumption, the reference to the *Citibank* case is pointless.

C. The Issues in this Case Cannot be Considered Without Some Prior Disposition of the Other Petitions for Writs of Certiorari Relating to This Litigation.

It is clear from a reading of the lengthy opinions below that the legal issues herein[7] are unusually complex and interdependent so that any attempt to separate out any one of them must result in distortion. There are two other petitions for certiorari pending in this Court which raise some of those issues. The failure of the Court to grant or to deny those petitions makes it impossible to consider this petition in proper context.

For example, Cuba urges, in its petition for certiorari (No. 73-1287), that while the Court of Appeals was correct in holding that Cuba's act of state defense was sound, it erred in assuming that the *Citibank* decision had adopted a counterclaim exception to that defense. If Cuba is ultimately successful in its argument that there is no such exception, the present discussion about affirmative judgments is pointless, for Dunhill will not even be entitled to a judgment up to the amount of Cuba's judgment against it.

Equally important is a second petition, filed jointly by petitioner Dunhill and the other importers (Saks & Co. v. Republic of Cuba, No. 73-1289). In *that* petition, Dunhill argues that the former owners are estopped from asserting their right to recover for the purchase price of pre-intervention shipments. Should petitioners be successful in that argument, the former owners will get nothing for pre-intervention shipments and the judgments against Cuba (including Dunhill's judgment here) will fall.

We do not now argue for any particular resolution of those questions; we merely urge that to proceed with this

7. For purposes of this discussion, we will disregard the trade mark issues which are clearly separable from those raised by this petition.

case, while leaving the other questions in abeyance makes no sense at all.

We suggest that a proper resolution of these issues requires either:

1) the granting of all three petitions;

2) the denial of all three petitions;

3) the granting of some petitions and the denial of others.

The Court has adopted a fourth alternative: it has granted one petition and taken no action at all on the others. This could result in endless litigation and prolong for years this lawsuit which is already 13 years old.

POINT II

The Act of State Doctrine bars recovery of a judgment in favor of petitioner.

As we note elsewhere (*supra*, p. 12) the respondents have never contended that the in-court statements of respondents' counsel "constitute" an act of state. As petitioner agrees, counsel's in-court statements were "no more than statements of a litigating position" (Petitioner's Br., p. 5). There may be situations in which statements of counsel may constitute an act of state, but no such contention is made here.[8]

8. It follows that petitioner's reliance (Br. p. 12) on *Compania Espanola de Navegicon Maritima* v. *The Navemar*, 303 U.S. 68 (1938), is misplaced. The issue in that case was not whether the Court would accept the statement of the Ambassador of Spain as a statement of the government, but whether the statement of the government as transmitted to the Court by the ambassador was in fact

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Under our law a statement by counsel is deemed to have been authorized by his client. *Laird* v. *Air France Engine Service, Inc.*, 262 F. 2d 948 (5th Cir. 1959; *Vaccaro* v. *Alcoa S.S. Co.*, 405 F. 2d 1133 (2nd Cir. 1968). We have here counsel's advice to the Court that his client, the Republic of Cuba, is relying on the act of state doctrine as a defense to the claim of petitioner. Therefore, the proper question before this Court is whether the act of state defense is available on the facts of this case.

Petitioner argues that there was no "act" by the Republic of Cuba which could have constituted an act of state. But on the record here there is ample showing of an act of state by Cuba. The interventor, an agent of the state, accepted and retained the petitioner's payments for pre-intervention shipments.[9] Moreover, such money was accepted on a claim of right, namely that the decree of September 15, 1960 nationalized accounts receivable. Furthermore, the interventor has refused to repay the monies accepted by it, and still claims that he is entitled to that

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supported by the record. The Court found that it was not. The statement of an ambassador, like the statement of a lawyer, is not proof of anything. It is merely an assertion made by the representative of a sovereign as to the position taken by that sovereign in litigation.

9. Petitioner (Br., p. 3) persists in stating that "interventors' principal line of defense . . . was to dispute that they had ever received the money," although the two lower court opinions to which petitioner refers say no such thing. When the belated claim of the former owners for pre-intervention shipments was discovered in 1967, the interventors admitted receiving a portion of the payments. As to the balance, the relevant records had been destroyed, and so the interventors could neither affirm nor deny such receipt. The District Court found that the interventors had been paid the full amount and the Court of Appeals affirmed. That issue is therefore no longer in this case.

money by virtue of the nationalization decree.[10] It matters not that the interventor may be wrong in the eyes of the United States court. The act of state doctrine does not stand or fall on whether the sovereign is right under United States law.[11] Since the monies taken by the interventor were in Cuba, and he was a representative of the sovereign, it can hardly be denied that his conduct amounted to "a taking of property within its own territory by a foreign sovereign government." *Sabbatino* at p. 428.

It is agreed by all that an act of state need not be evidenced by any particular formality, and this Court, and others, have frequently found an act of state on much less than the conduct of Cuba in this case. So, in *Underhill* v. *Hernandez*, 168 U.S. 250,[12] the "act" of the state consisted of the detention of the plaintiff, and an assault on him committed by some soldiers of a revolutionary army in the field. Likewise, in *Oetjen* v. *Central Leather Co.* 246 U.S. 297, and *Ricaud* v. *American Metal Co.*, 246 U.S. 304, the act of state was the physical seizure of property by soldiers in the field. See also *American Banana Co.* v. *United Fruit*, 213 U.S. 347.

We cannot see how the interventor's receipt of funds and his refusal to repay them under a claim that they were included in the nationalization decree is any the less an act of Cuba than General Villa's seizure of hides and their retention in the *Oetjen case* was an act of Mexico.

In *French* v. *Banco Nacional*, 23 N.Y. 2d 46 (1968), the Cuban government refused to pay certain obligations evidenced by certificates of indebtedness issued by Banco

10. See Petition for Certiorari filed by the interventor, No. 73-1287, pp. 4, 12-14.

11. As the Court of Appeals pointed out, "repudiation [of a debt] does not appear ever to have been recognized as a violation of international law." 485 F. 2d at 1370.

12. "The classic American statement of the act of state doctrine." *Banco Nacional* v. *Sabbatino, supra.*

Nacional. It argued that sovereign immunity applied; that the certificates of indebtedness did not really constitute a promise to pay; that a decree of the Currency Stabilization Fund had excused payment, and that the act of state doctrine banned judicial review of Cuba's repudiation of its debt. The Court of Appeals of New York found no sovereign immunity; it also found that the certificates in question were in fact promises to pay. There was some disagreement as to whether the decree of the Currency Stabilization Fund was valid and even as to whether it was applicable, but the majority of the Court of Appeals held that even if there had been no decree, Cuba's repudiation constituted an act of state. "[T]he act of state was the defendant's refusal to perform, . . ." 23 N.Y. 2d at 66.

The Court of Appeals for the Second Circuit has likewise held that an act of state need not be a formal act of the government, but may consist of a course of conduct. In *Bernstein* v. *van Heyghen Freres, S.A.*, 163 F. 2d 246 (2nd Cir. 1947), *cert. den.*, 332 U.S. 772, no formal government act was alleged. Plaintiff claimed that unidentified "Nazi officials" had forced him to give up control of a corporation he owned. The Court held that there was an act of state. *Accord, United States ex rel. Heymann* v. *Watkins*, 159 F. 2d 650 (2nd Cir. 1947); *Union Shipping and Trading Co.* v. *United States*, 127 F. 2d 771 (2nd Cir. 1942); *Hewitt* v. *Speyer*, 250 F. 367 (2nd Cir. 1918). See also *Occidental Petroleum Corp.* v. *Buttes Gas and Oil Co.*, 331 F. Supp. 92 (C.D. Calif. 1971), *aff'd*, 461 F. 2d 1261 (9th Cir. 1972) *cert. den.* 409 U.S. 950; *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474 (1938).

The petitioner has confused the issue before this Court by extended reference to the doctrine of sovereign immunity (Br. pp. 17, 20). The doctrines of act of state and sovereign immunity are related and sometimes overlap, but they are not the same thing. There are many cases in

which sovereign immunity is a defense and act of state is not. For example, *Spacil* v. *Crowe*, 489 F. 2d 614 (5th Cir. 1974). There are other cases in which the converse is true. *French* v. *Banco Nacional, supra; Oetjen* v. *Central Leather Co., supra; Bernstein* v. *van Heyghen Freres, S.A., supra.* And, there are undoubtedly some situations in which both defenses are available.

But the principles behind the two doctrines are quite different. The act of state doctrine teaches that the courts of the United States will not inquire into the acts of a sovereign done within its territory. The doctrine of sovereign immunity teaches that a sovereign and its property may be immune from suit or attachment in some circumstances. As Mr. Justice Brennan points out in his dissent in *Citibank*, the application of the act of state doctrine relieves the Judicial Branch of the necessity of assessing claims under international law under circumstances which may interfere with the foreign relations of the United States. No such virtue attends the application of the doctrine of sovereign immunity. 406 U.S. at 789, fn. 13.

It follows that petitioner's argument, that the Court of Appeals "in effect granted Cuba the sovereign immunity it could not otherwise effectively plead" (Pet. Br., p. 19) is not well taken. Every case in which the sovereign successfully relies on an act of state (as in *Sabbatino*) results in a decision in favor of the sovereign. In many such cases, the defense of sovereign immunity would not be available to the sovereign as it may not have been available here.[13]

13. Just for the record, a word or two concerning the so-called restrictive doctrine of sovereign immunity may be appropriate. That doctrine derives from the Tate letter, 26 Dept. of State Bulletin 984 (1952), and has never been reviewed by this Court. Further, it has been disregarded both by the courts and the State Department itself in two recent cases, both involving Cuba; *Spacil* v. *Crowe, supra,* and

(Footnote continued on next page)

But that fact in no way derogates from the applicability of the act of state defense.

Petitioner at pp. 14-19 of its brief seeks to break down the rationale of the *Sabbatino* decision into "five factors" and then proceeds to argue that none of these "factors" are applicable here. We suggest that such analysis is misleading and mistakes the thrust of the *Sabbatino* case.

Basic to the act of state doctrine is the principle that relations between states which affect both legal and political issues ought to be left to the Executive Branch of the government and that judicial review of the acts of a foreign state should not be undertaken in those kinds of cases in which the issues touch "sharply on national nerves" (*Sabbatino* at 428). There is a danger, said this Court, that in such cases there may be an affront to the foreign government and an interference with the ability of the executive to dispose of differences which may exist between the United States and the foreign government. One of the elements the Court looked to is the extent of codification or at least consensus concerning the particular area involved, as evidenced by treaties or uniform international practice.

The Court found in *Sabbatino* (at 430) and it is equally true here, that "it is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals" of the members of the family of nations. And petitioner does not challenge the conclusion reached by the Court in *Sabbatino*

(Footnote continued from previous page)

Rich v. *Naviera Vacuba*, 197 F. Supp. 710 (E.D. Va. 1961), *aff'd* 295 F. 2d 24 (4th Cir. 1961). Certainly the pending bills, S.566 and H.R. 3493, 93rd Cong., 1st Sess., on which petitioner seems to place some reliance (Br., pp. 18-20) have nothing to do with this case. They relate to sovereign immunity, not to act of state, and they have not been enacted into law.

(at p. 428-430) that there is no consensus among the nations of the world as to the respective rights of the nationalizing country and the foreign property owners.[14]

One additional point is made in the *Sabbatino* case which is of substantial significance in this case. In *Sabbatino* this Court warned against the problems arising from "piecemeal disposition" of controversies between nations. In the present proceeding, petitioner is urging this Court not only to indulge in a piecemeal disposition of the claims of American creditors against Cuba, and cross-claims which Cuba may have against the United States or its nationals, but it is even urging the Court to engage in a piecemeal disposition of this very litigation by isolating one issue out of many. There is no doubt that a resolution of the differences between the United States and Cuba will some day be resolved by negotiation and, of course, such negotiation must be carried on by the Executive Branch. To attempt a piecemeal disposition of claims at this date is illustrative of the wisdom of the *Sabbatino* decision and the desirability of applying the act of state doctrine to this controversy.

POINT III

There is no justification for a "counterclaim exception" to the Act of State Doctrine; if an exception of any kind is appropriate, it ought not to encompass the facts of this case.

As we point out above (p. 14) this Court has never approved a "counterclaim exception" to the act of state

14. For reasons which are not clear to us, petitioner, in discussing the question of the codification of international law, makes reference, at page 18 of its brief, to bills pending in Congress on the subject of sovereign immunity. As we note above at p. 20, sovereign immunity is quite different from act of state, and, in any event, the proposed bills represent a proposed codification of United States law and not international law.

doctrine. The most that can be said is that in the *Citibank* case, *supra*, one Justice (Mr. Justice Douglas) approved such a counterclaim exception in broad terms at 406 U.S. 771); and that three other justices (Chief Justice Burger and Justices White and Rehnquist) approved an exception only when there was a "Bernstein/Stevenson" letter affirming the view of the State Department that its policy did not require the application of the act of state doctrine (at 406 U.S. at 764). The other five justices of the Court specifically disapproved a counterclaim exception to the *Sabbatino rule* (406 U.S. at 773, 793).

A. The *Citibank* Opinion of Mr. Justice Douglas.

With all due respect, we submit that the concurring opinion of Mr. Justice Douglas was in error; it ought not to be endorsed by the Court and should be reexamined by Mr. Justice Douglas himself. Acceptance of a counterclaim exception to the act of state doctrine is possible only if one is basically in disagreement with the *Sabbatino* decision. Every argument used by the Court in the *Sabbatino* case—the proper division of functions between the Judicial and Executive Branches; the possibility of embarrassment to the Executive Branch; the danger of touching upon the most "sensitive nerves" of a foreign power; the absence of codification or a consensus among the nations of the world as to the proper law on this subject;—all of these arguments have equal force whether a court is considering an original claim or a counterclaim.

There is only one possible argument in support of Mr. Justice Douglas' opinion and that is one based upon "fairness." But *every* application of the act of state doctrine, just like every application of the doctrine of sovereign immunity and, indeed, every judicial enforcement of cur-

rency control regulations is "unfair."[15] The question before the Court is not whether a result is fair or unfair to the litigants, but whether it is required by overriding considerations affecting the welfare of the United States. The *Sabbatino* decision gives the answer to that and we submit again with the greatest respect that the opinion of Mr. Justice Douglas in *Citibank* ignores it.

B. The Opinion of Mr. Justice Rehnquist

The opinion of Mr. Justice Rehnquist in the *Citibank* case likewise gives no support to the petitioner. We argued in that case and urge once again here that a "Bernstein letter" ought not to be considered by this Court in passing upon an act of state case and six of the nine justices on this bench agreed with us. *Cf. Dreyfus* v. *Von Finch*, — F. Supp. — (S.D.N.Y. May 20, 1974, No. 73 Civ. 5271). But quite aside from that, the Rehnquist opinion is not applicable here. We have no Bernstein letter and the letter submitted by the State Department in the *Citibank* case is in no way applicable to this case for three reasons:

(1) Mr. Stevenson's letter, even in its own terms, does not apply to this case because the State Department (like Mr. Justice Douglas) made it clear that any counterclaim exception to the act of state doctrine should *not* apply to an affirmative judgment against a foreign power.

15. Mr. Justice Douglas stated at p. 772 that "To allow recovery without more would permit Cuba to have its cake and eat it too." But Cuba will have no cake in this situation, as any recovery it gains will be frozen and will not be paid over except by an order of Congress or the Executive Branch. See *Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106 (2nd Cir. 1966), *cert. den.*, 385 U.S. 898, in which this Court refused to review a decision of the Second Circuit Court of Appeals which was grossly and admittedly unfair to an aged Cuban worker because there were national policy considerations which outweighed any private interest plaintiff may have had.

(2) The letter in the *Citibank* case was written in 1970 and was based on the requirements of the "foreign policy interests of the United States." Obviously the foreign policy interests of the United States vary from time to time and by the time this case is heard more than four years will have passed since Mr. Stevenson wrote his letter to this Court. Those are four momentous years in the history of our country and in the development of its foreign policy, and there is no reason for believing that the foreign policy interests of the United States are the same now as they were at that time, especially in view of the silence from the State Department.

(3) The State Department letter in the *Citibank* case expressed policy of the Department "in this or like cases." 442 F. 2d at 538. The *Citibank* case involved the nationalization of Citibank's property in Havana. This case involves an action for unjust enrichment arising out of a commercial transaction. There is no reason to believe that Mr. Stevenson's letter in the *Citibank* case intended to encompass cases as unlike as these two litigations.

The petitioner, acting upon the suggestion inherent in the second question framed by this Court in granting the petition, has urged that the three cases which were tried together should be considered as a single case and that the aggregate judgment in favor of respondent in the two other cases be used as the standard against which the judgment of petitioner shall be measured in determining whether there is here an affirmative judgment in favor of petitioner. There are several reasons why this cannot be done:

First, as we note above, *supra*, p. 13, there are no "co-defendants" in this litigation. Four actions against petitioner were filed in the district court in 1961; in 1966, those four actions were consolidated into a single action against petitioner, and respondents were allowed to intervene as a

parties-plaintiff. Since there happened to be at the moment two other cases pending in the district court raising similar issues the three cases were tried together. Separate counsel represented each of the defendants; separate testimony was offered, and separate judgments were entered.

Second, in the extensive litigation in the Southern District of New York involving actions by and against Cuba there has been a considerable overlap of legal issues. The litigation by Cuba against First National City Bank and Chase Manhattan Bank involved issues which were in many respects identical. The cases involving sugar shipments raised another class of issues. Cases against tobacco importers raised still other kinds of issues. There are still pending and untried in the Southern District of New York still other litigation involving banks which raises still other issues. Most, if not all of the cases, raised one or another aspect of the act of state doctrine.

In the tobacco litigation of which petitioner's claim is part, the joint trial of three cases was found convenient because the same counsel represented all of the former owners, the same counsel represented the interventor in all three cases, and the three lawyers representing the importers were prepared to work together in a consolidated trial. But these three cases are not the only tobacco cases then pending in the Southern District and it is coincidence that these three cases happened to get tried together while the others were left out.[16]

In the cases against First National City Bank and Chase, the issues are likewise similar. Had history developed a bit differently those cases likewise could have been tried together and perhaps that would have been a

16. See *Tabacalera Cubana* v. *Chadbourne*, 61 Civ. 2301; *Tabacalera Cubana* v. *Faber, Coe & Gregg*, 66 Civ. 3477; *Romeo y Julietta* v. *Faber, Coe & Gregg*, 61 Civ. 1749; *Piedra* v. *Wood*, 61 Civ. 1177.

quicker and more convenient way of handling the legal and factual issues which had to be decided by the court. They were not consolidated for trial and, indeed, the Chase case has only just been tried in the district court while the First National City Bank case has already been decided in this Court.

Whether particular cases are tried together has nothing to do with the respective rights of the parties; such consolidation is merely a convenient tool for the economical use of the court's time. Petitioner's argument would lead to the result that First National City Bank could have secured an affirmative judgment against Banco Nacional in the *Citibank* case and enforced it against a judgment which Banco Nacional may get against Chase Manhattan. It is equally improper to urge that, under the so-called counterclaim exception recognized by a minority of this Court in the *Citibank* case, petitioner may get an affirmative judgment against Cuba because, for the convenience of everyone involved, the case happened to be tried together with two other cases.

Third, there is an interest involved here which has not been taken into consideration either by the petitioner or by the court in framing its question, and that is the interest of the other two branches of government. Congress and the Executive branch in concert have set up an elaborate program for the registration of claims against Cuba and the freezing of Cuban assets in the United States, presumably with the view of a possible ultimate settlement, similar to the settlement reached with other countries, which will utilize the frozen funds to pay off a portion of the claims. Supra, p. 8. We believe that in the *Citibank* case this Court did a disservice to that program and that the dissenting opinion of Mr. Justice Brennan, 406 U.S. at 794, was quite right in urging that failure to apply the act of

state doctrine resulted in a preference for a favored creditor. See also the Court of Appeals decision in *Citibank*, 442 F. 2d at 535.

The position taken by petitioner here thus offends national policy. Petitioner, a potential judgment-creditor against Cuba, evidently expects to be able to collect its claim by executing against a judgment in favor of Cuba against Faber, Coe & Gregg. First National Bank of Boston has submitted an amicus brief in this case; it evidently expects to collect a possible judgment in its favor by executing against a judgment Cuba may recover against Chase Bank, and has sought to attach Cuba's claim. If this leak in the dike is permitted it will not require much of a flood to wipe out all of the Cuban assets in the United States in a very short time, thus frustrating totally the policy of the Executive branch and of Congress.

If, on the other hand, the policy of the Executive and Legislative branches is to be maintained, everything that we are doing in connection with this pending petition is a total waste of time since the affirmative judgment for which petitioner is struggling so hard would have nothing against which it may execute.

CONCLUSION

The petition herein was improvidently granted and the Writ of Certiorari should be dismissed. Alternatively, the judgment of the Court of Appeals should be affirmed.

VICTOR RABINOWITZ
Attorney for Respondents
30 East 42nd Street
New York, New York 10017

DORIAN BOWMAN
Of Counsel

August 29, 1974

Appendix A

Title 31, Code of Federal Regulations, Part 515, entitled "Cuban Assets Control Regulations," in relevant part provide as follows:

§ 515.101 Relation of this part to other laws and regulations.

The Cuban Import Regulations issued on February 6, 1962, as amended, are hereby revoked and the following Regulations are hereby adopted in place thereof controlling all financial and commercial transactions involving Cuba or nationals thereof, provided that the revocation of the Cuban Import Regulations shall not be deemed to authorize any unlicensed importation prohibited by the Cuban Import Regulations and all penalties, forfeitures, and liabilities under such Regulations or any other applicable laws or regulations shall continue and may be enforced as if such revocation had not been made.

* * *

§ 515.201 Transactions involving designated foreign countries or their nationals; effective date.

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of a foreign country designated under this part, or any national thereof, or such transactions involve property in which a foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatesoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set

forth in paragraphs (a) or (b) of this section is hereby prohibited.

(d) For the purposes of this part, the term "foreign country designated under this part" and the term "designated foreign country" mean Cuba and the term "effective date" and the term "effective date of this section" mean with respect to Cuba, or any national thereof, 12:01 A.M., E.S.T., July 8, 1963.

• • •

§ 515.310 Transfer.

The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power.

Appendix A

§ 515.311 Property; property interests.

Except as defined in § 515.203(f) for the purposes of that section the terms "property" and "property interest" or "property interests" shall include, but not by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness obligations, notes, debentures, stocks, bonds, coupons, any other financial securities, bankers' acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, contracts or licenses affecting or involving patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

Appendix B

July 1, 1974

Mr. Stanley Sommerfield
Office of Foreign Assets Control
Treasury Department
Washington, D.C.

Re: Frozen Cuban Assets

Dear Mr. Sommerfield:

It has always been my understanding that the Office of Foreign Assets Control, as a matter of policy, would not permit a creditor of Cuba to collect a judgment by executing on frozen assets belonging to Cuba, whether those funds were in the bank accounts that we have maintained in the name of "Rabinowitz & Boudin Special for the Account of the Republic of Cuba and its Agencies" or they were in the possession of some debtor of Cuba. Such a license would obviously constitute a preference for the judgment-creditor and that, I would assume, would require a policy decision which has not yet been made either by Congress or by the Treasury Department.

The question has arisen several times in the past and most recently in connection with a claim by Dunhill & Co. against the Republic of Cuba. Dunhill had assumed that if it secured a judgment against Cuba, it could execute that judgment against money owing to Cuba from other creditors and it had in fact attempted to attach funds owing to Cuba by Faber, Coe & Gregg, another cigar importer whose claim is likewise in litigation. I advised counsel for Dunhill that I doubted that you would license execution on any judgment that Dunhill might obtain, but indicated that if you did approve, I would submit a settlement proposal to my clients. I later heard that counsel for Dunhill

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had spoken to you and that you indicated that you would not approve such an execution; further, I now learn that my clients will not agree either.

It would be helpful if you would confirm my understanding that, generally speaking, you will not issue a license to permit a judgment-creditor of Cuba to execute against assets of Cuba which have been frozen pursuant to the Foreign Assets Control regulations. Such a confirmation by you of this policy will be helpful to me in dealing with both potential creditors of Cuba and the courts.

Sincerely yours,

VICTOR RABINOWITZ

VR:mc

THE DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

FOREIGN ASSETS CONTROL
IN REPLY REFER TO: FAC No. 77768

Aug. 1, 1974

Mr. Victor Rabinowitz
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017
Dear Mr. Rabinowitz:

Reference is made to your letter of July 1, 1974 with respect to licensing execution on blocked Cuban assets.

This will confirm your understanding that in general it is not in accord with licensing policy under the Cuban

Appendix B

Assets Control Regulations to authorize a judgment-creditor of Cuba to execute against assets of Cuba which have been frozen pursuant to the Cuban Assets Control regulations.

Very truly yours,

STANLEY L. SOMMERFIELD
Acting Director
Office of Foreign Assets Control